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SUPREME COURT, U.S.

No. 07-1168

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, et al.,
Respondents.

On Petition for Rehearing of the Order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING PURSUANT TO SUPREME COURT RULE 44.1

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QUESTIONS PRESENTED

In *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993), the D.C. Circuit interpreted *McDonnell Douglas* to require an additional showing for White plaintiffs in reverse discrimination cases over and above what would be required by minority plaintiffs. Consistent with that ruling (and in continued conflict with those of the Fourth Circuit), the D.C. Circuit in *Johnson v. Gadson* et al., denied [t]he petition for panel rehearing, as well as [t]he motion for appointment of counsel, deeming such appointment unwarranted because Petitioner did not show a "sufficient likelihood of success on the merits" of his case.

1) Whether requiring an additional showing for White plaintiffs in reverse discrimination cases over and above what would be required by minority plaintiffs violates the Equal Protection Clause?

2) Johnson is a White man of mixed racial ancestry; given that the "real reason" Johnson has been refused legal services is the mixed racial ancestry, did the D.C. Circuit error in applying a heightened pleading standard under *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993) to Johnson's case?

3) Given that Johnson did not fail to plead "back ground circumstances" as established by *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993) shouldn't the D.C. Circuit have aloud Johnson's case to go forward?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant below is Kenneth W. Johnson.

The Respondents here and Defendants – Appellees below are Jesse Gadson, Tony S. Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

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JURISDICTIONAL STATEMENT

On October 16, 2007, Petitioner filed his Petition for Rehearing Pursuant to FRAP 40 in the United States Court of Appeals for the District of Columbia Circuit. He filed his Petition for Rehearing En Banc in the same court on November 6, 2007.

These petitions remained pending in the D.C. Circuit when Petitioner filed his Petition for Writ of Certiorari on December 26, 2007 (docketed on January 9, 2008) and his "January 16, 2008" Corrected Petition for Writ of Certiorari (undocketed) in this Court. (See Corrected Pet. at 1.)

The court of appeals denied Petitioner's petition for rehearing en banc by Order dated January 23, 2008. That same day, it also denied his petition for panel rehearing, as well as his motion for appointment of counsel, deeming such appointment unwarranted because Petitioner did not show a "sufficient likelihood of success on the merits" of his case.

On March 13, 2008, Petitioner filed the Petition for Writ of Certiorari in Case No. 07-1168. On May 19, 2008 the Petition was denied. The Petitioner now files the Petition for Rehearing.

RELEVANT STATUTES INVOLVED IN THE CASE

42 U.S.C. § 1981:

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law.

STATEMENT OF THE CASE

On January 9th, 2006, Johnson filed a Complaint in the United States District Court for the District of Columbia.

On May 30, 2006, the district court granted Petitioner's motion for leave to amend his Complaint to add McGuireWoods LLP as an additional defendant. On June 9th 2006, Johnson filed a 106-page Amended Complaint.

On July 10, 2006, McGuireWoods LLP and Tony Lee moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)6 for failure to state a claim on which relief could be granted.

By Order dated September 19, 2006, the district court granted the Rule 12(b)(6) motion to dismiss. In an 11-page memorandum opinion the district court concluded that Petitioner failed to state any claims upon which relief could be granted.

The court of appeals denied Petitioner's petition for rehearing en banc by Order dated January 23, 2008. That same day, it also denied his petition for panel rehearing, as well as his motion for appointment of counsel, deeming such appointment unwarranted because Petitioner did not show a "sufficient likelihood of success on the merits" of his case.

STANDARD OF REVIEW

The function of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)6 is to "test the sufficiency of the plaintiff's allegations," while that of a motion for summary judgment pursuant to Fed.R.Civ.Pro. 56 is to "test the sufficiency of the non-moving party's evidence in light of the legal theory it has advanced." *Covad Communs. Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005).

In *Covad* Id. supra, the Court stated: "Alternatively, Bell Atlantic urges us to hold, as a matter of law, that its bringing the patent suit could not have harmed competition. In so doing, Bell Atlantic confuses the function of a motion to dismiss pursuant to Rule 12(b)6, which tests the sufficiency of the plaintiff's allegations, with a motion for summary judgment pursuant to Rule 56, which tests the sufficiency of the non-moving party's evidence in light of the legal theory it has advanced. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("simplified notice pleading standard [of the Federal Rules of Civil Procedure] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims").

The *McDonnell Douglas* framework—which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of

discrimination—is an evidentiary standard, not a pleading requirement. See, e.g., 411 U.S., at 800.

ARGUMENT

First, the United States Court of Appeals for the District of Columbia Circuit has entered a decision in conflict with the decision of the United States Court of Appeals for the Fourth Circuit on the same important matter. In *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993), the D.C. Circuit interpreted McDonnell Douglas to require an additional showing for White plaintiffs in reverse discrimination cases over and above what would be required by minority plaintiffs. The court held that, because racial discrimination against White persons is so rare, in order to establish the necessary inference of discrimination, White plaintiffs must prove "background circumstances" that support an inference of discrimination. Whereas, in *Lucas v. Dole*, 835 F.2d 532 (4th cir. 1987), the Fourth Circuit refused to adopt the D.C. Circuit's "background circumstances" requirement and instead applied the McDonnell Douglas standard in the same way to Whites as to other plaintiffs.

The Plaintiff alleges that Attorney Jesse Gadson stated to Kenneth Johnson's face, "You have no civil rights" (see Amended Complaint at page 48). If Johnson were an African American and Black, would the D.C. Circuit have dismissed Johnson's claims as showing "insufficient likelihood of success on the merits" of his case? If Johnson

were an African American and Attorney Gadson were a White attorney, would the D.C. Circuit have sanctioned a White man telling a Black man that he "[had] no civil rights", and dismissed Johnson's claims as showing "insufficient likelihood of success on the merits" of his case? Or rather, has the D.C. Circuit required of Johnson an additional showing in a reverse discrimination case over and above what would be required by a minority plaintiff, and thereby violated the Equal Protection Clause?

Second, the Court failed to consider the historical context with respect to the treatment of citizens of mixed racial ancestry in the United States, when deciding this case. See Exhibit Volume 1 of 3 at 112. In applying a heightened pleading standard to Johnson's claims, the D.C. Circuit has ruled contrary to Swierkiewicz v. Sorema N.A., Id. supra (which applies equally to all plaintiffs). In addition, the Court has demonstrated its refusal to confront the difficulties faced by persons of mixed racial ancestry in the United States by failing to even acknowledge the possibility that both Black American Lawyers and White American Lawyers alike could discriminate against Johnson in the making and enforcing of contracts. In the face of the indisputable evidence of Johnson's innocence in the circumstances surrounding the closure of his business in May, 1997 (see trial testimony in Exhibit Volume 1 of 3 at 157-229 and in Exhibit Volume 2 of 3 at 368-377), he has been unable to get an attorney to take appropriate action on his behalf for over 10 years.

The court of appeals denied Petitioner's petition for rehearing en banc by Order dated January 23, 2008. That same day, it also denied his petition for panel rehearing, as well as his motion for appointment of counsel, deeming such appointment unwarranted because Petitioner did not show a "sufficient likelihood of success on the merits" of his case. Federal Rule of Civil Procedure 12(b)6 is not intended to be so burdensome as to require a plaintiff to show a "sufficient likelihood of success on the merits" of his case in order to survive a motion to dismiss. The purpose of the 12(b)(6) motion is to test the sufficiency of the allegations – that is, to make sure certain things are stated in the Complaint in order to give the Defendants timely notice of the actions for which they are being sued. Federal Rule of Civil Procedure 12(b)6 does not require that, in addition to having stated a claim, the plaintiff prove that he is ultimately likely to prevail. The plaintiff is not required to try and win the case to the court's satisfaction "with his Complaint" in order to survive a motion to dismiss under Rule 12(b)6, yet that is what the Court of Appeals is demanding of the Plaintiff by stating that the Petitioner did not show a "sufficient likelihood of success on the merits" of his case and then dismissing the appeal on reconsideration on January 23, 2008.

Ultimately, this case is about the hardships, difficulties, and wrongs faced by individuals of mixed racial ancestry living in American society. We live in a democracy, where we are brought up to believe that everyone has civil rights no matter

what their racial background may be. In the instant case, Kenneth W. Johnson asserts that he has been told that "[he] has no civil rights", that he was declined legal representation after disclosing his racial ancestry, has stated that Attorney Tony Lee forged someone else's signature on a legal contract, and has been denied the opportunity to make and/or enforce contracts with each of the Defendants. Again, the Petitioner asks the Supreme Court to consider whether such allegations would be trivialized in the manner shown by the D.C. Circuit Court and dismissed, if Johnson were African American and Black?

The U.S. District Court noted in its September 20, 2006 Amended Memorandum Opinion: "Johnson, a man of mixed racial ancestry who alleges that he 'looks either Caucasian/European or predominately Caucasain/European' (Am. Compl. at 6), complains because none of the defendants, all attorneys, agreed to represent him in his pursuit of legal remedies relating to matters that occurred in 1997 when he was arrested, tried, and acquitted in the Superior Court for the District of Columbia. On the basis of these refusals, he alleges race discrimination, legal malpractice, and intentional infliction of emotional distress."—Corrected Appendix to the Petition for Rehearing at page 10. The U.S. District Court's language here makes it clear that the defendants have been given notice of Johnson's claims, which is the purpose of a Complaint (not to try the case without the development of an evidentiary record).

Furthermore, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) requires that these allegations of race discrimination be taken to be true – and, if upheld, such discrimination unequivocally constitutes grounds for relief.

It's important to note, that attorney Jesse Gadson refused to sign his name to the retainer agreement that he had Johnson sign. See Jesse Gadson's retainer agreement in Exhibit Volume 1 of 3 at [E—73-75].

As established by the facts of this case: The idea that someone who is a White man of mixed racial ancestry is not permitted to prosper in the United States of America is wrong. "I mean, Mr. Johnson is making money at this club. The only evidence that we have is the testimony or documentary evidence in this case is the exhibit, the door sheet, that was introduced by the Government that I asked Mr. Johnson about. On the evening in question 75 people paid five dollars, 101 people paid ten dollars, 350 people paid fifteen dollars. By my math, Your Honor, that's $5, 250 just for those individuals. I don't know if there were more that night but $5, 250.00.... Now, Mr. Johnson said, and if we are to credit his testimony in this respect, well, the band subtracted their costs and then I took half of what was left. Well, on that particular night there were $5, 250 in gate receipts. There was rounded up, $1500 for the band, which leaves an amount that when defendant shared, Mr. Johnson's share for half of that, what was

remaining would have been $2, 557 for that night. That was his half that remained after the band expenses were deducted, one night over – – a little over $2500 which is by my math about $5100 for a weekend, which for a year, give or take, is over $250, 000. Your Honor, as the – – THE COURT: That's almost as much as lawyers make. MR. MCBRIDE: Similar, Your Honor, yes."— [Exhibit Volume 2 — 369].

Johnson would not have lost his business and two commercial buildings had the District of Columbia and the Police Department not stopped Johnson's income, by closing down his business among other things. Clearly, with a $250,000.00 per year income Johnson would have been able to pay the $34,000.00 per year rent on his 10 year commercial lease for the 10,000 square foot public hall. See the attached 2nd Affidavit of Kenneth Johnson in Exhibit Volume 1 at 38-43, which details Johnson's minimum post construction losses, and the lost of income earning potential that Johnson has suffered. See Exhibit Volume 2 at 686.

The June 9th 2006 Amended Complaint states: "[The total number of customers Prosecutors McBride has counted is 526 customers for May 17, 1997. Johnson's earnings for 36 nights had averaged to be $3,138.00 per night from club operations from January 1, 1997 to May 17, 1997 totaling $113,000.00 for the first [5 & ½ months of 1997 "correcting Amended Complaintl"]. The income was stopped after May 17, 1997. The business was open ten hours per week at that time

– until completion of construction. After which, the 300 seat hall was to be open from 6am-9pm, seven days per week as a cafeteria —commercial restaurant kitchen equipment was bought and paid for; see receipts [E3—682-683], 4 commercial bars and a commercial kitchen were under construction at time of forced closing down of Johnson's 300 seat public hall. Johnson will file a motion to admit video tape evidence of these facts. The club operation was to advance to five days per week, 11pm -3am at the completion of construction. 400 chairs, inter alia, had been bought and paid for; see receipts [E—684] the chairs are visible in video tape along with the construction on the public hall." —Amended Complaint at 89.

"Johnson had purchased approximately $20,000.00 of an approximately $30,000.00 "concert" sound system; see photographs Exhibit Volume 3 of 3, pages 671 and a portion of the total receipts [E—674-680]. At the completion of Johnson's "concert" sound system, the $500.00 a night that was being paid to the concert sound provider [E—369] would be paid to Johnson. Johnson does not have all the "concert sound" receipts, however, these are a few of the receipts [E674-680]. Also owning my own concert sound system reduces my daily operation cost because I don't have to pay $500.00 per day to rent one." — Amended Complaint at 89. The Amended Compliant goes own to detail Johnson's losses at pages 89-90.

"Prior to the District of Columbia's closing down of Johnson's business (recorded on video tape) Johnson's business in its pre-completion of construction phase had risen from 0 customers per day to guess counts in the 500s and 600s range and had begun to see guest counts break the 700 guest count per night barrier between January 1 and May of 1997 on some nights before the business was closed down by the policies of the D.C. Government affected upon Johnson by its police officers, officials, and policy makers" —Amended Complaint at 90.

The May 21, 1998 Complaint in *Johnson v. District of Columbia, Mayor Marrion Barry Jr.* C.A. 3837-98 states in pertinent part: "After this devastating experience my customer base collapsed, all my income stopped from this incident from my nightclub. I lost a deal on a car dealership that was in the works"—[Exhibit Volume 2 of 3 at 298]. What the criminal trial transcripts and findings of fact by the Superior Court Judge prove is that the District of Columbia and the Police Department never had probable cause to take the action that they took against Johnson or the right to close his business down and prosecute him for operating it. Johnson was threatened with further retribution if he continued to operate his business. The business stayed closed down for an extended period of time, and when Johnson re-opened his customers base was gone. Johnson would not have closed his business down, and ended $5,000.00 to $10,000.00 per day in income if he were not "in fear" of further retribution by the District of

Columbia Government and Metropolitan Police Department. [T]hey conducted covert operations to target and destroy a lawful business for reasons that were racially and illegally motivated.

CONCLUSION

Johnson asks the Supreme Court of the United States to grant this Petition for Rehearing.

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6/12/2008

IN THE
SUPREME COURT OF THE UNITED STATES

Kenneth Johnson PETITIONER,	)	
v.	)	No. 07-1168
Jesse Gadson, *et al*. RESPONDENTS.	)	

CERTIFICATE OF COUNSEL

As required by Supreme Court Rule 44.1, I certify that the "**PETITION FOR REHEARING PURSUANT TO SUPREME COURT RULE 44.1**" is presented in good faith and not for delay, and that its grounds are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented and the relevant facts, statutes, and case law as it relates to the "grounds" not previously presented. Even in presenting new grounds, the Petitioner must discuss those grounds as it relates to the case. It is restricted to the grounds specified in paragraph 2 of Supreme Court Rule 44.2 and the relevant facts, statutes, and case law as it relates to the "grounds". This is a legal question, and Petitioner is not a lawyer.

I declare under penalty of perjury under the laws of the United States of America that the

foregoing is true and correct to the best of my knowledge, understanding, and belief as a pro se non-attorney litigant.

Executed on June 11, 2008

Kenneth W. Johnson
9803 Allenford Circle, Apt. 203
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Notary Public

Subscribed and Sworn to before me this 11th day of June 2008

OFFICIAL SEAL
TOLU O. SOGUNRO
NOTARY PUBLIC-STATE OF MARYLAND
MONTGOMERY COUNTY
My Commission Expires 10-17-2011.